No. 97-1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VAUGHN MURPHY,

Petitioner,

vs.

UNITED PARCEL SERVICE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

STEPHEN R. McALLISTER
University of Kansas
School of Law
Green Hall
Lawrence, Kansas 66045
(785) 864-4550

KIRK W. LOWRY
Counsel of Record
PALMER, LOWRY,
LEATHERMAN & WHITE LLP
112 West Sixth, Suite 102
Topeka, Kansas 66603
(785) 233-1836

Attorneys for Petitioner

152305

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Cited Authorities

ARGUMENT

I. The ADA's "Disability" Determination Should Be Made Without Consideration Of Mitigating Measures

Respondent United Parcel Service ("UPS") takes the position that many Americans should receive no protection under the ADA because, at least in theory, they might be able to ameliorate some of the effects of their impairments. On the other hand, many of those same people need not bother applying for employment with UPS, which would never consider hiring them. UPS's position is in direct conflict with the ADA's directive that employers focus on employees' *abilities*, not their *disabilities*.

UPS repeatedly asserts that the ADA only applies to the "truly disabled."[1] Perhaps UPS believes that Title I only applies to people who use wheelchairs. But that was not Congress's view when it enacted Title I, and nothing in the language and structure of Title I of the ADA so limits the statute. This Court should reject UPS's invitation to interpret the ADA to perpetuate rather than eliminate traditional stereotypes about the disabled.

A. The ADA's Language And Structure Demonstrate That The "Disability" Definition Is Inclusive

1. *The Plain Meaning.* As explained and anticipated in petitioner's opening brief, UPS's exclusive reliance on the statute's present tense usage of the word "limits" is misplaced. Not surprisingly, UPS cites *no* cases in which this Court has found the present tense usage of a verb to be dispositive in determining a statute's meaning.[2]

---

1. Even were UPS correct that Title I protects only the "truly disabled," a phrase the ADA never uses, Vaughn Murphy would qualify for protection. A study published in 1995 indicates that, although approximately 24% of adult Americans have some level of hypertension, Vicki L. Burt, *et al.*, *Prevalence of Hypertension in the US Adult Population: Results From the Third National Health and Nutrition Examination Survey, 1988-1991*, 25 Hypertension 305, 307 (1995), less than 1% have hypertension in the Stage III or IV ranges. *Id.* at 310 (Table 4). Murphy's extraordinary hypertension, 250/160 untreated, is Stage IV.

2. The only case UPS purports to rely upon, *United States v. Wilson*, 503 U.S. 329 (1992), involved a statutory provision that used the past and present perfect tenses, in conjunction with the passive voice, all of which, as the Court (Cont'd)

The present tense is a preferred and common usage in stating general truths or describing repeated situations. *See, e.g.*, H. Ramsey Fowler, *The Little, Brown Handbook* 156 (1980); *see also* William Strunk, Jr., & E.B. White, *The Elements of Style* 31 (3d ed. 1979) (in summarizing action, "use the present" tense). Present tense usage is both good grammar and good style. Moreover, present tense usage is prevalent throughout the ADA, as well as the entire United States Code. Thus, it is no surprise and of no special significance that Congress phrased the statutory "disability" definition in the present tense. Rather, it is more logical to conclude that only deviations from present tense usage are likely to be significant for purposes of statutory interpretation. *Cf. United States v. Wilson*, 503 U.S. 329, 333-34 (1992) (relying in part upon statute's use of present perfect tense to ascertain meaning).

UPS's assertion that Murphy and his *amici* are seeking to rewrite the statute in the subjunctive mood to require courts and employers to engage in speculative and hypothetical inquiries is unfounded. Congress phrased the definition in the most natural way in the English language, a way that is both grammatically and stylistically appropriate. Moreover, as further discussed in Part I.C. below, Congress expressly intended that the statutory language be read to exclude consideration of mitigating measures, as the relevant committee reports establish. Congress at a minimum viewed the statutory language "impairment that substantially limits" as capable of meaning "unmitigated impairment that substantially limits", even if other readings may also be plausible. Thus, the interpretation that the Equal Employment Opportunity Commission ("EEOC") and a majority of the Courts of Appeal have adopted is faithful to the statutory language, principles of English grammar and style, and Congress's expressed intent.

(Cont'd)
acknowledged, made that particular provision somewhat confusing. Even so, this Court in *Wilson* adhered to its holistic approach to statutory construction, considering not only the verb tense, but also another sentence in the statute that supported the Court's interpretation, *id.* at 334, whether one interpretation would produce an absurd result, *id.*, and reasons why Congress might have intended one reading or another. *Id.*

Furthermore, there is nothing hypothetical about the inquiry required if mitigating measures are ignored. Murphy's Stage IV hypertension is permanent. Persistent hypertension is a result of increased cardiac output and/or a rise in peripheral, vascular resistance. Braunwald, *Heart Disease: A Textbook of Cardiovascular Medicine*, at 816 (5th ed. 1997). Blood pressure itself is not an impairment, but a clinical and diagnostic marker for underlying pathology in the cardiovascular system. *See, e.g.*, J.A. 65a-66a. Strictly speaking, it is this underlying pathology that is Murphy's "impairment," but it is the effect of that pathology—severe hypertension that damages his cardiovascular system and end organs—that "substantially limits" his major life activities.

Murphy's hypertension may fluctuate depending on the effectiveness of his medication and the side effects particular dosages produce, but Murphy is never "cured," nor is his physiological impairment ever "under control," even if medication limits some of its effects. Thus, Murphy is in the class of individuals "with *characteristics* that are beyond the control of such individuals." 42 U.S.C. § 12101(7) (emphasis added). UPS's effort to limit the ADA's reach on the basis of this congressional finding is unavailing, both in this case and in general. Murphy's "characteristic" is beyond his control. Moreover, and in any event, Congress did not limit the ADA's protections to those individuals whose impairments are beyond their control.[3]

There is nothing hypothetical about concluding that Murphy's underlying impairment, which he cannot cure nor eliminate,

---

3. UPS's assertion that "in petitioner's view" even people whose impairments have been permanently altered by "subconscious internal adjustments, surgery, or the like will continue to enjoy" protection under the first prong of the "disability" definition, Resp. Br. 12, is thus inaccurate. UPS ignores that there must be an "impairment" before the first prong of the ADA definition can possibly apply, but that the same is not true of the second and third prongs. If, for example, surgery permanently eliminates an individual's medical condition, then that individual may not have an "impairment" at all. If so, the first prong would no longer protect that individual. The second and third prongs ("record of" impairment, or "regarded as" having such an impairment), however, might still cover the individual.

substantially "limits" him in many major life activities, such as exercising, running, caring for himself and working. Indeed, the hypothetical inquiries are whether Murphy's lifelong regimen of medication will continue to be effective and what side effects it will cause. As the record in this case demonstrates, Murphy's blood pressure fluctuates significantly even while he is on medication. There is no way to objectively and precisely determine his level of hypertension in his medicated state. His underlying impairment, on the other hand, is permanent, and its unmedicated effects are capable of objective evaluation.

Justice Souter has declared for a unanimous Court that

> Over and over we have stressed that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849). No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning. Statutory construction "is a holistic endeavor," and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.

United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., 508 U.S. 439, 455 (1993) (other internal citations omitted).

Under the EEOC interpretation, endorsed by a majority of the Courts of Appeals, each aspect of the statutory definition has operative effect. Thus, Murphy must prove that (1) he has an impairment that (2) without mitigation substantially limits (3) one or more of his major life activities. *Cf. Bragdon v. Abbott*, 118 S. Ct. 2196, 2202-07 (1998); *id.* at 2214 (Rehnquist, C.J., concurring in part, dissenting in part). Murphy is not arguing that high blood pressure is a *per se* or inherent disability, although at extreme levels some impairments, including hypertension, will almost necessarily be disabling. The ADA requires an evaluation of the impairment's effect on the individual, but that proposition alone does not answer the mitigating measures question.

2. *Statutory Structure and Context.* Holistic statutory interpretation requires that the terms of a statute be read in the context of the "surrounding body of law into which the provision must be integrated." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring). UPS, however, never really addresses the ADA's overall structure and context. UPS never explains how its interpretation of the ADA "disability" definition gives any separate effect or purpose to the statute's other inquiries, such as determining (1) the essential functions of the job at issue, (2) whether a plaintiff is a "qualified individual", (3) whether reasonable accommodations are possible, and (4) whether the person would present a safety risk to others.

UPS's primary "structural" argument appears to be that, through the "record of" and "regarded as" prongs of the statutory "disability" definition, Congress extended "coverage to certain individuals whose impairments are not in fact substantially limiting", allegedly demonstrating that "Congress knew how to protect individuals who are not in reality substantially limited." Resp. Br. 14. But UPS's argument is flawed, both in its premise and its logic. Nothing in the "record of" or "regarded as" prongs requires that the covered person even have an "impairment", much less any sort of resulting limitations. It would be absurd to read the ADA to offer *no* protection to Murphy, because medication can mitigate some of the effects of his severe hypertension, while protecting a plaintiff who does not even have an actual *impairment*, much less a *substantially limiting* one. To use a favorite UPS phrase, it is difficult to see how the latter person is "truly disabled." Rather, Congress's inclusion of the "record of" and "regarded as" alternatives in the statute are confirmation of the *breadth* of the entire threshold "disability" definition, not the narrowness of the first prong. *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995) (Posner, C.J.) ("Disability is broadly defined.").[4]

4. There is no plausible claim that interpreting the ADA to ignore mitigating measures in making the disability determination will raise constitutional problems in applying the statute to Murphy. *See* Resp. Br. 12 n.6. Prohibiting UPS's discrimination against prospective or actual employees such as Murphy does not exceed Congress's power to regulate (Cont'd)

3. *Absurdity*. UPS's proposed interpretation of the statute will lead to absurd results. For example, under UPS's interpretation, no protection will be afforded to an employee whose medication is effective and causing no significant side effects at the time the employer takes action adverse to that individual.[5] But the same employee might then become protected by the ADA if, for example, the adverse employment action causes the employee to lose health insurance that pays for the medication—because then the effects of the employee's impairment would not be ameliorated.

Thus, under UPS's approach, the same person could at one moment in time be fired by the employer without fear of ADA liability, but at a later time be protected by the ADA, or a subsequent potential employer might violate the ADA if it refused to hire the (now unmedicated) employee. As Justice Ginsburg observed in *Bragdon v. Abbott*, "[n]o rational legislator . . . would require nondiscrimination once symptoms become visible but permit discrimination where the

(Cont'd)
interstate commerce, no matter how broadly the class of persons having a "disability" is defined. *See* 42 U.S.C. § 12101(b) (stating that Congress relied, *inter alia*, upon its commerce power in enacting the ADA). Whether there might be any plausible constitutional objection to applying the ADA to the States is, of course, a different matter under the Eleventh Amendment, but UPS as a private employer has no standing to raise such an objection which would not assist UPS. In any event, UPS has waived any constitutional argument here. It did not raise the argument in the courts below, and neither lower court opinion mentions, much less addresses, the argument. *See, e.g., Pennsylvania Dept. of Corrections v. Yeskey*, 118 S. Ct. 1952, 1956 (1998) (refusing to address constitutional challenge to ADA when issue was neither raised nor addressed in the lower courts).

5. The notion that conditions such as Murphy's hypertension are "controlled," something that both UPS and its *amici* assert, *see, e.g.*, Resp. Br. 1, is simply untrue in this case and frequently untrue as a matter of medical fact. More likely is that the effects of such conditions may be ameliorated or limited, but there is no *cure* for Murphy's hypertension, and his high blood pressure fluctuates significantly even when medicated. Even with medication, Murphy is not close to having "normal" blood pressure. Moreover, the nurse that performed Murphy's DOT examination testified that, in his view, Murphy's blood pressure is not under control, J.A. 75a, and no medical person, including UPS's designated medical expert, testified that Murphy's hypertension is in fact "under control."

disease, though present, is not yet visible." 118 S. Ct. at 2214 (Ginsburg, J., concurring). The absurdity of UPS's interpretation is that an individual with an incurable impairment, such as Murphy's severe hypertension manifests, may at times be protected by the ADA and at other times not, even though the individual's underlying impairment has not changed, and probably never will.

UPS also argues that "petitioner's interpretation would require courts and agencies to ignore the adverse effects of medication or other ameliorative measures." Resp. Br. 15 But it is precisely because of the side effects of mitigating measures such as medication that the courts should not consider the ameliorative results of those measures in making the disability determination. The nature and severity of side effects often may fluctuate over time or with varying types or dosages of medication, as is true in Murphy's case. Thus, consideration of such measures is an inherently unstable basis for making the disability determination. The underlying impairment, however, remains constant and is a more objective way to measure the individual's limitations. Moreover, if the side effects of the medication are more severe or disabling than the impairment itself, presumably no rational individual would undertake the mitigating measure.

Nor is any unreasonable or extraordinary burden placed on employers by adopting a rule excluding consideration of mitigating measures. If, indeed, as UPS suggests, "to the employer, individuals whose impairments are controlled may not appear to be impaired in any way," Resp. Br. 16, then employers have nothing to fear in terms of ADA liability. If an employer has no knowledge that an employee is or might be considered disabled, it seems impossible that the employer could ever be proven to have discriminated on the basis of a "disability."[6] What UPS's argument completely ignores in this

6. Moreover, as UPS well knows, the kinds of pre-employment inquiries that it asserts will be necessary in fact are generally prohibited by the ADA, which states that "a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." 42 U.S.C. § 12112(d)(2)(A). Rather, the ADA instructs employers to focus on the person's *ability* to do the job, not an individual's
(Cont'd)

context, is that the "disability" inquiry is only a preliminary, threshold determination. It is not the sole and final determinant of ADA liability.

In contrast to UPS's proposed interpretation, a rule that ignores mitigating measures in making the disability determination is faithful to the statutory scheme and purposes. Such a rule permits individualized assessment of a person's impairment and its effects, and it results in a consistent and constant result that the person either is disabled under the ADA or is not, period. Only this interpretation can provide the "clear" and "consistent" standards Congress declared as a purpose of the ADA. *See* 42 U.S.C. § 12101(b)(2).

4. *ADA Policy.* UPS's argument that Murphy somehow seeks to use his hypertension to place himself in a "privileged class" of ADA-protected individuals is unfair to Murphy. *See* Resp. Br. 20. The evidence is undisputed that, absent medication, Murphy likely would be hospitalized because of his hypertension. J.A. 80a-81a. Murphy is not seeking something to which he is not entitled; he did not create his medical condition to gain an employment "advantage," and he has managed to work as a mechanic for some employers with very limited accommodations required. But UPS refused to consider *any* accommodations, minimal or not. Instead, UPS's categorical and unreflective assumption that Murphy cannot perform the job represents precisely the kind of "stereotypic assumptions not truly indicative of the individual ability of such individuals," 42 U.S.C. § 12101(7), that Congress intended to be scrutinized under the ADA. UPS's obsession with Murphy's hypertension, instead of his ability, thwarts rather than serves the policies of the ADA.

UPS offers the "example" of a person with hypertension who is "unable" to take medication, but has the same minimal limitations that UPS believes Murphy suffers *when taking medication*. Resp. Br. 19-20. UPS then declares that, although such a hypothetical person and Murphy are "equally limited," it is somehow contrary to the ADA's

(Cont'd)
disability. *Id.* § 12112(d)(2)(B) ("A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions."). The employer may follow up a conditional job offer with a physical examination, but the point is that the ADA directs employers to focus on prospective employees' *abilities*, not *disabilities*.

policy that only Murphy is protected. *Id.* at 20. UPS's example confirms, rather than refutes, the logic and the wisdom of a rule that excludes consideration of mitigating measures. As the undisputed facts demonstrate, Murphy does not have the option of being "unable" to take blood pressure medication. He would be hospitalized and at high risk for serious medical complications without medication. J.A. 64a, 80a-81a. Thus, Murphy and UPS's hypothetical person are not "equal" at all, and it is by no means contrary to the ADA's purposes to protect Murphy from UPS's discrimination.

UPS also speculates that giving the ADA its full scope will actually harm the "truly disabled" because the ADA will be more costly to employers, making it more likely that employers will successfully plead "undue hardship." Resp. Br. 20. What this suggestion ignores is that individuals like Murphy often require no accommodation at all; they just want employment opportunities on equal footing.[7] The ADA requires employers like UPS to focus on employees' *abilities*, not their *disabilities*.[8] Moreover, the ADA already takes into account the concerns of employers by mandating inquiries into the essential functions, qualified individual, and reasonable accommodations issues, as well as recognizing potential defenses based on concerns about the safety of other workers. Congress, as our national legislature, considered all of the concerns UPS now raises,

7. There is no legitimate reason to permit disability discrimination against individuals whose self-initiated mitigating measures happen "to be exceptionally good." *Fallarcaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997). Rather, firing an employee when *no* accommodation by the employer will be necessary only makes the employer's conduct more pernicious. Yet, this is precisely the result that UPS's interpretation of the "disability" definition would condone.

8. Indeed, had UPS focused on Murphy's abilities, rather than on his actual or perceived disabilities, the uncontroverted medical evidence is that Murphy's hypertension does not interfere with his ability to safely operate a commercial motor vehicle. *See* J.A. 67a (Q: "Is Vaughn Murphy's hypertension likely to interfere with his ability to operate a commercial motor vehicle safely?" A: "No.") (testimony of treating physician, Debra Doubek, M.D.); *id.* at 70a ("In summary, his blood pressure readings are elevated but I feel he is healthy to drive a truck for test purposes") (Report of treating physician, Debra Doubek, M.D., provided to UPS before it fired Murphy).

and Congress struck the balance that it deemed appropriate between the interests of employers and the rights of the disabled. Congress's policy choices were not irrational, and there is no basis for overriding or rewriting them.

B. Rehabilitation Act Cases And Regulations Neither Adopt Nor Support A Rule That Mitigating Measures Be Considered

UPS's argument that the Rehabilitation Act cases and regulations compel interpreting the ADA's "disability" definition to require consideration of mitigating measures is meritless. As explained in footnote 8, at page 21, of Murphy's opening brief, neither the Rehabilitation Act cases nor the relevant agency regulations resolve the mitigating measures question.[9]

UPS itself concedes that "[t]he regulations issued under the Rehabilitation Act do not specifically discuss ameliorative measures." Resp. Br. 28. Nor did the pre-1990 cases adopt a general rule requiring consideration of mitigating measures. Contrary to UPS's assertions, there are many more Rehabilitation Act cases that appear to *assume* that mitigating measures are ignored, than that give any credence to the "rule" UPS asserts. The few cases UPS cites lack any persuasive value. Almost all are district court decisions, some unpublished, and none actually discuss the issue in any detail. The Ninth Circuit case UPS relies on, *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), is a case in which the choice of rule made no difference because the court recognized that the plaintiff was "handicapped" even if her medication was considered.

If anything, on balance, what guidance the Rehabilitation Act cases provide supports evaluating "handicaps" *without* consideration of mitigating measures. *See, e.g.,* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 154 n.295 (1999) (citing and discussing Rehabilitation Act cases); *see also* Brief for the United States and Equal Employment Opportunity Commission as *Amicus Curiae* (U.S. Br.), at 12 n.5 (discussing Rehabilitation Act cases and regulations); Brief for AIDS Action, *et al.* As *Amicus Curiae*, at 3-6 (same).

9. One of UPS's *amici* concedes this point. *See* Brief of *Amicus Curiae* Society for Human Resources Management 13 n.9 ("the issue was never conclusively decided under the Rehabilitation Act").

C. The ADA's Legislative History Confirms That The "Disability" Determination Should Be Made Without Consideration Of Mitigating Measures

The legislative history clearly and repeatedly expresses Congress's intent and understanding that the statutory language excludes consideration of mitigating measures, whether those measures are employee-initiated (*e.g.*, medication or prosthetic devices), or employer-sponsored ("auxiliary aids" or "reasonable accommodations"). The House Labor Committee Report, for example, provides as follows:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

H.R. Rep. No. 101-485(II), at 52 (1990). Thus, Congress's references to "hearing aids" and "medication" are not, as UPS states, Resp. Br. 33, "stray passages." Rather, they are concrete examples of what Congress meant by the term "mitigating measures." The House Judiciary Committee Report makes precisely the same point, H.R. Rep. No. 101-485(III), at 28-29 (1990),[10] and the Senate Report's inclusion of the same general

10. The two other House Reports simply do not address the mitigating measures question. The report of the House Committee on Public Works and Transportation does not discuss the "disability" definition at all, *see* H.R. Rep. No. 101-485(I) (1990), and the report of the Committee on Energy and Commerce contains only an abbreviated discussion that simply repeats the statutory language, notes the relationship to the Rehabilitation Act, and comments on the change in terminology from "handicapped" to "disabled." *See* H.R. Rep. No. 101-485(IV), at 36 (1990). Thus, these (Cont'd)

statement regarding mitigating measures, but without specific examples, is most naturally read to have the same meaning.[11]

The House Committees' use of the word "mitigating" to refer generally to all measures that may ameliorate the effects of an impairment is entirely consistent with ordinary usage of the word. *See, e.g., Webster's Third New International Dictionary* 1447 (1986) (defining "mitigate" as "to make less severe, violent, cruel, intense, painful"). In contrast, UPS offers no basis for its conjecture that Congress understood the word "mitigating" to refer only to employer-sponsored measures, but not to employee-initiated measures, such as medication.[12] Thus, UPS's discussion of the ADA's legislative history is flawed. Legislative history is rarely so clear as it is on the mitigating

(Cont'd)
reports provide no support for UPS's suggestion that they demonstrate a congressional intent to require consideration of mitigation measures. Resp. Br. 33 n.18.

11. Thus, UPS's effort to cast some doubt on the Senate Report, because it refers only to "mitigating measures such as reasonable accommodations or auxiliary aids", Resp. Br. 32, is unavailing. Indeed, the Senate Report, by the use of the phrase "such as," refers to these mitigating measures only as non-exhaustive examples, and in part to emphasize that later inquiries in the statute are not to be imported into the threshold "disability" determination. Moreover, as the Fifth Circuit observed, "the Senate Bill that was ultimately passed was amended to contain much of the text of the House Bill, indicating that the House's understanding of the ADA controlled the bill that was passed." *Washington v. HCA Health Serv. of Texas, Inc.*, 152 F.3d 464, 468 (5th Cir. 1998).

12. The absence of any discussion of the mitigating measures issue in the final House Conference Report refutes rather than supports UPS's narrow interpretation. Indeed, the absence of such discussion demonstrates that both houses of Congress understood the statute not to require consideration of mitigating measures. Under Congress's rules, a conference committee generally can only resolve conflicts between the bills passed in the two chambers. *See, e.g.*, Senate Rule XXVIII.2; House Rule XXII.9. Thus, the conference report's silence reflects prior agreement on the question. Because the relevant language was the same in both bills, and the House and Senate Committee reports were in explicit agreement that mitigating measures should be ignored, it would have been improper — as well as unnecessary — for the conference report to address the issue.

measures issue, and that history demonstrates that Congress read the statutory definition to require that mitigating measures be ignored.

In any event, even were the Committee Reports read to point in contrary directions, that situation would establish that reasonable legislators could disagree about what the statutory language requires. That in turn would establish, at a minimum, that the statutory language may plausibly be read in more than one way, and that deference should be given to the views of the federal agencies Congress charged with implementing the ADA.

D. The EEOC's Interpretation Is Entitled To Deference

UPS's argument that the EEOC's interpretive guidance is entitled to no deference at all hinges entirely on the erroneous proposition that there is only one plausible reading of the first prong of the "disability" definition. Because UPS's "plain meaning" argument fails, UPS's "no deference" argument necessarily also fails.

UPS acknowledges that, under *Chevron*, deference to agency regulations is appropriate unless the regulations are " 'contrary to clear congressional intent' after applying 'traditional tools of statutory construction.' " Resp. Br. 34 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 & n.9 (1984)). This Court recently reiterated that, when considering whether deference to an agency regulation is appropriate, "we first ask whether Congress has 'directly spoken to the precise question at issue. If the *intent* of Congress is clear, that is the end of the matter. . . .' " *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 499-500 (1998) (quoting *Chevron*, 467 U.S. at 842) (emphasis added); *see also Cedar Rapids Comm. Sch. Dist. v. Garrett*, 119 S. Ct. 992, 1000 (1999) (Thomas, J., dissenting) (same proposition).

The preceding quotation highlights that this Court's *Chevron* doctrine focuses on congressional *intent*, and this Court traditionally has ascertained such intent not just by reference to the language of the statutory provision at issue, but also the statute's purposes, structure, context and legislative history. All of these traditional tools of statutory construction are appropriate considerations in applying the *Chevron* doctrine.

The ADA's structure and purposes establish the correctness of an interpretation that ignores mitigating measures. Furthermore, the legislative history confirms that Congress "intended" such an interpretation.[13] Thus, although deference to the EEOC's regulations and interpretive guidance is unnecessary in this case, the EEOC's interpretation is completely consistent with Congress's explicitly declared *intent*.

Furthermore, this Court's recent decisions have declined to draw any sharp distinction between an agency's regulations and an agency's interpretation of its own regulations. Indeed, the Court has given deference even to agency positions set forth in litigation documents. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 462 (1997) (unanimous Court deferring to agency interpretation set forth in an *amicus* brief). UPS's only argument to evade such recent decisions is that the statutory language in this case is susceptible of only one interpretation and, therefore, there is nothing for the EEOC to "interpret." *See* Resp. Br. 36.

UPS also argues that Congress did not delegate to the EEOC the authority to interpret the "disability" definition. Resp. Br. 37. This argument leads nowhere. Congress expressly delegated to the EEOC the authority to issue rules and regulations to implement the provisions of Title I (employment). *See* 42 U.S.C. § 12116. Because application of any of Title I's provisions hinges on the threshold "disability" determination, Congress's delegation necessarily included the authority to address the "disability" definition.

In UPS's view, *no* federal agency actually has any authority to issue rules or regulations regarding the "disability" definition, because that definition is contained in a preliminary section of the ADA over which Congress did not expressly delegate authority to any particular agency. UPS argues that a contrary conclusion would result in overlapping rulemaking authority for the multiple agencies involved in enforcing the ADA, Resp. Br. 37, but it is unclear both why Congress would lack the authority to make such a delegation or why

13. Even UPS concedes that there is legislative history directly contradicting UPS's restrictive reading of the statute. *See* Resp. Br. 33 (acknowledging contrary statements).

it makes any difference in this case. As UPS knows, the federal agencies charged with implementing the various titles of the ADA have *uniformly* adopted the rule that mitigating measures are not to be considered. *See, e.g., Bragdon v. Abbott*, 118 S. Ct. at 2206 (pointing out Justice Department interpretation that is identical to EEOC view). Thus, even if UPS's concerns had a foundation in general, there is no conflict in this case.

UPS also asserts that the EEOC's interpretive guidance is not entitled to deference because it "conflicts with earlier and later pronouncements of the agency." Resp. Br. 39. This argument, however, is premised on UPS's assertion that, in a *single, administrative Rehabilitation Act case* that came before the agency *in 1990*, prior to the ADA even being enacted, the EEOC allegedly asserted a position that UPS believes supported interpreting the Rehabilitation Act to require consideration of mitigating measures in making the "handicap" determination. *See* Resp. Br. 28. Even were that assertion accurate, it says nothing about the EEOC's interpretation of the ADA. Thus, UPS has no support for the assertion that the EEOC has changed its position on the mitigation issue under the ADA.

Nor is there any basis for UPS's assertion that the EEOC's interpretive guidance and regulations are internally inconsistent. First, the EEOC's position on mitigating measures in no way conflicts with its position requiring individualized assessments rather than creating a list of "disabilities." Second, there is no inconsistency between the EEOC's interpretation of the first prong of the ADA "disability" definition, and the EEOC's use of "controlled high blood pressure" as an example of an individual "regarded as" disabled.

A person with a condition such as diabetes, epilepsy or hypertension, the effects of which can be ameliorated with medication or diet, may not be substantially limited even without such measures. Thus, the EEOC's example may simply postulate a case too mild to be substantially limiting. More importantly, the first and third prongs of the "disability" definition are complementary, so that the EEOC's high blood pressure example may be covered under the first prong if medication or other mitigating measures are ignored, or under the "regarded as" prong if such measures are considered. In either event,

the point is that an individual such as Murphy is covered by the ADA, as Congress intended.[14]

Since it first adopted its interpretive guidance in 1991, the EEOC has consistently adhered to the interpretation that mitigating measures should be ignored in making the "disability" assessment under the ADA. That reasonable interpretation, which is based on the ADA's language, structure, and purposes, as well as the clear legislative history, is entitled to deference.

E. In This Case, Summary Judgment On The Threshold "Disability" Question Is Not Appropriate

This Court recognized in *Bragdon v. Abbott*, 524 U.S. 624 (1998), that the ADA's threshold "disability" determination is a fact-intensive inquiry. This Court also has consistently emphasized that, when ruling on a summary judgment motion, federal courts must view the evidence in the light most favorable to the non-moving party, with disputed facts and inferences drawn in favor of that party and against the moving party. *See, e.g., Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997). Faithful application of that standard in this case, which the lower courts resolved on summary judgment, mandates a reversal and remand.

---

14. UPS also erroneously claims that the EEOC did not invite public comment with respect to the mitigating measures question and that, as a result, no deference is due to the agency's position. Resp. Br. 35. The EEOC's initial public notice made clear that the agency contemplated issuing regulations *and* interpretive guidance, and that comments were invited on the "disability" definition in particular. 55 Fed. Reg. 31192 (1990). The EEOC later published its proposed regulations and interpretive guidance in their entirety, inviting comment on any of it. 56 Fed. Reg. 8578 (1991). The EEOC received many comments addressed to the mitigating measures issue. *See* Colker, *supra*, 34 Harv. C.R.-C.L. Rev. at 154-55 & n.302 (discussing those comments and concluding that "the EEOC followed standard procedures regarding notice and comment in promulgating the mitigating measures rule"). That the EEOC finalized its interpretive guidance in response to those comments is to be expected, not condemned. UPS's argument would require that no deference be given to any regulatory language that appears in response to final public comments, a proposition for which UPS cites no authority.

There is no factual dispute in this case that Murphy's extraordinary, Stage IV hypertension is permanent, J.A. 67a, 71a, or that the long term impact is major organ damage, for instance to his heart, kidneys and eyes. *Id.* at 64a, 72a. There also is undisputed evidence in the record that, if Murphy were not medicated, he probably would be hospitalized. J.A. 80a-81a. Thus, if mitigating measures are ignored, the evidence precludes a grant of summary judgment to UPS on the "substantially limits" requirement.

Moreover, there is record evidence that Murphy is substantially limited in major life activities *even when medicated*. Murphy testified that he has brought his blood pressure below 140/90 with medication, but that the side effects significantly limited his ability to function. J.A. 55a-56a. Even the District Court acknowledged that Murphy cannot lower his blood pressure to normal levels "without suffering severe side effects such as stuttering, loss of memory, impotence, lack of sleep and irritability." Pet. App. 16a. UPS asserts that Murphy faces no substantial limitations when medicated, but that position at most creates genuine issues of material, disputed fact that preclude summary judgment in either party's favor.

II. At A Minimum, There Are Genuine Issues Of Material, Disputed Fact As To Whether UPS "Regarded" Murphy As Disabled

The "regarded" as inquiry, like the "substantially limits" inquiry, is fact-intensive, and must be conducted on an individualized basis in each case. The Tenth Circuit, however, engaged in no such inquiry in rejecting Murphy's "regarded as" argument as a matter of law on summary judgment. The Tenth Circuit relied solely on the legal proposition that Murphy could not obtain DOT certification to drive commercial motor vehicles. *See* Pet. App. 5a. At a minimum, this Court must reverse and remand on the "regarded as" issue, with directions that the lower courts engage in the statutorily-required factual inquiries.

A. Reliance Upon DOT Regulations Confirms Rather Than Negates That UPS "Regarded" Murphy As Disabled

The ADA's threshold "disability" inquiry does not include evaluation of other statutory questions such as whether the individual

is qualified for the job. In *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 285 (1987), this Court rejected (under the Rehabilitation Act) the argument that qualification standards could be used to exclude individuals from the statutory "handicapped" definition, the very argument UPS is now pressing under the ADA.[15] The *Arline* Court concluded that

> [s]uch exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent. *Id.*

Nonetheless, UPS relies on job qualification standards to argue that Murphy does not satisfy the threshold "disability" requirement. If UPS relied on its own rule that no mechanic should have blood pressure above 140/90, it appears UPS would argue that it fired Murphy not because it "regarded" him as disabled, but because he failed to meet UPS requirements. As *Arline* makes clear, however, the later statutory inquiries into the essential functions of the job and the individual's qualifications exist for the precise purpose of dealing with the propriety of such standards and requirements. Thus, if medically sound standards preclude Murphy from working for UPS, then those standards may be a *justification* for UPS's views towards Murphy, and possibly a defense under the ADA, but they are not part of the threshold "disability" inquiry.

---

15. UPS asserts that Murphy's hypertension rendered him "unable to qualify" for the job, Resp. Br. 43 n.24, and that UPS fired Murphy "solely because his high blood pressure exceeded DOT limits." *Id.* at 43. UPS also asserts that there is no evidence that, when Murphy's blood pressure was retaken after UPS's nurse examined his file, the examiner issued Murphy even a temporary DOT health certificate. Resp. Br. 2, 49. But there is no reason the examiner would have done so, since Murphy already possessed a DOT certificate from his previous examination, and UPS did not pursue the process to have that certification revoked. *See* 49 C.F.R. § 391.47.

B. Murphy's Hypertension "Substantially Limits" And "Significantly Restricts" His Job Opportunities

Because there is no dispute that UPS was aware of Murphy's impairment, the sole issue is whether UPS viewed that impairment as substantially limiting Murphy in the major life activity of working. EEOC regulations provide that an individual is substantially limited in the major life activity of working when the person is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. 1630.2(j)(3)(i). UPS contends that Murphy's hypertension only precludes him from the particular job of being a UPS mechanic, Resp. Br. 44, but that assertion is false as a factual matter and, in any event, would not provide an appropriate basis for summary judgment in this case, even had the Tenth Circuit relied upon it.[16]

As UPS concedes, Resp. Br. 46 n.26, DOT certification is required for "all employers, employees and commercial motor vehicles, which transport property or passengers in interstate commerce." 49 C.F.R. § 390.3(a). The United States represents that DOT had issued more than 7.1 million such certifications by 1994, when the events in this case occurred. *See* U.S. Br. 25 n.11. UPS asserts that Murphy was not entitled to work in any job requiring such certification. Moreover, UPS alone "is one of the largest employers in the United States, with nearly 300,000 employees in all 50 states and every territory." Brief of UPS as *Amicus Curiae* in *Albertson's, Inc. v. Kirkingburg*, No. 98-591, at 1. Importantly, as UPS's action in this case demonstrates, if Murphy's hypertension precludes him from obtaining DOT certification, then he may be barred not only from driving a commercial motor vehicle in interstate commerce, but also from ancillary jobs such as servicing such vehicles. This is not a case where Murphy is precluded from a single, narrow category of opportunities.

The nurse who examined Murphy for DOT purposes testified that Murphy's hypertension would disqualify Murphy from any jobs

---

16. The Tenth Circuit never addressed this inquiry, instead rejecting Murphy's claim as a matter of law on the sole ground that he could not satisfy the "DOT's requirements for drivers of commercial vehicles." *See* Pet. App. 5a.

in the occupational categories of "heavy" or "very heavy" work. J.A. 78a. Further, the nurse testified that, in his opinion, Murphy should be restricted to "medium" work, "[o]r less," *id.*, and that he (the nurse) "would restrict [Murphy] out of classes such as heavy construction work, steel workers, [or] any type of job that again requires a great deal of physical activity or endurance." *Id.* at 79a. Likewise, Murphy's treating physician testified that she would have concerns about him performing "very heavy" or "heavy" work. *Id.* at 66a.

Neither the statute, nor the EEOC's regulation, requires that the employer view an employee as totally excluded from all—or even most—employment in order to be deemed to have "regarded" the employee as substantially limited in the major life activity of working. Thus, contrary to UPS's assertion, excluding Murphy from all jobs that require DOT certification—as well as ancillary positions—"substantially limits" or "significantly restricts" his employment opportunities, even if it does not entirely eliminate them. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2206 (1998) ("The Act addresses substantial limitations, not utter inabilities.").

The Tenth Circuit erred in rejecting Murphy's "regarded as" claim as a matter of law, without engaging in the class of jobs inquiry.

CONCLUSION

With all due respect, at a minimum there are genuine issues of disputed, material fact on the questions whether Vaughn Murphy's severe hypertension substantially limits one or more of his major life activities and whether UPS "regarded" him as disabled. For the foregoing reasons, Murphy respectfully requests that this Court reverse the judgment of the Tenth Circuit, and remand the case for further proceedings.

Respectfully submitted,

KIRK W. LOWRY
Counsel of Record
PALMER, LOWRY, LEATHERMAN
& WHITE LLP
112 West Sixth, Suite 102
Topeka, Kansas 66603
(785) 233-1836

STEPHEN R. McALLISTER
University of Kansas
School of Law
Green Hall
Lawrence, Kansas 66045
(785) 864-4550

Attorneys for Petitioner